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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-617

ELMER GERTZ,
Petitioner,

VERSUS

ROBERT WELCH, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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January, 1973

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To the Justices of The Supreme Court of the United States:

The Respondent, ROBERT WELCH, INC., respectfully prays that the Petition for Writ of Certiorari filed herein be denied.

OPINIONS BELOW

The opinion of the District Court (Petitioner's Appendix B) is reported at 322 F.Supp. 997. The opinion of the Court of Appeals for the Seventh Circuit (Petitioner's Appendix A) is not yet officially reported. The Order denying Appellant's Petition for Rehearing (Petitioner's Appendix C) is not reported.

QUESTIONS PRESENTED

The Petitioner has briefed three questions in his Petition for Writ of Certiorari:

1. Was the Petitioner spoken of in a "public capacity"?
2. Was the Petitioner denied a fair trial and due process?
3. Did the taxation of costs against the Petitioner by the Court of Appeals deprive him of due process?

STATEMENT

The facts of the case are stated fully in the decisions of the District Court (Petitioner's Appendix B, at page 15a) and the Court of Appeals (Petitioner's Appendix A at page 1a); and Respondent respectfully suggests reference thereto, for an objective summary of the actual facts, rather than the distorted "Statement of the Case" presented in the Petition for Certiorari with statements, inferences and innuendos from outside the record obviously designed to prejudice the Court.

ARGUMENT

The Petitioner contends that he was not spoken of in a "public capacity", which is a new issue not presented to the Court of Appeals. There, the Petitioner's primary contention was that he was not a public figure, and that, insofar as the alleged libelous article concerned him, it was not a matter of public interest and that the *New York Times Co.*

v. *Sullivan*, 376 U.S. 254 standards were not applicable to him. However, the Court of Appeals recognized:

> "Plaintiff's considerable stature as a lawyer, author, lecturer and participant in matters of public import undermined the validity of the assumption that he is not a 'public figure' as that term has been used by the progeny of *New York Times*. * * *"

The trial court found, and the Court of Appeals affirmed the decision, that the article published in *American Opinion* magazine, "Frame-up, Richard Nuccio and the War on Police" was an article of significant public interest and deserving of First Amendment protection. In *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 43, this Honorable Court discussed First Amendment application to matters of public or general concern and held that if the alleged libel concerned a matter of general public interest then malice as defined in *New York Times* v. *Sullivan*, 376 U.S. 254[1], must be shown by the plaintiff.

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[1] "If a matter is a subject of public or general interests, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significants of the conduct, not the participant's prior anonymity or notoriety. The present case illustrates the point. The community has a vital interest in the proper enforcement of its criminal laws, particularly in an area such as obscenity where a number of highly important values are potentially in conflict: The public has an interest both in saying that the criminal law is adequately enforced and in assuring that the law is not used unconstitutionally to suppress free expression. Whether the person involved is a famous large-scale magazine distributor or a 'private' businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue. *We honor the commitment to robust debate on public issues which is embodied in the first amendment by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.*" (Emphasis supplied.)

Certainly, the alleged murder of an individual citizen by a policeman, a public servant, is of general public interest. The act of the policeman is the act of society and all law abiding citizens should be concerned. The Petitioner, while representing the Nelson Family privately, attended the coroner's inquest, which was a public hearing to determin whether or not a public statute had been violated and questioned Officer Nuccio as to his participation in the alleged murderous act. The trial court stated (Petitioner's Appendix B, page 19a):

> "* * * By representing the victim's family in litigation brought against the policeman, Gertz thrust himself into the vortex of this important public controversy. * * *"

Although Gertz was not the central character of the alleged libelous article, he was alleged to have been involved in the conspiracy to frame Chicago policemen.

Thus, the article published by the Respondent was of "public or general interest" and entitled to the shield of the First Amendment.

The Petitioner contends that he was denied a fair trial and due process because of the trial court's failure to allow him to introduce sufficient evidence of malice to overcome the First Amendment protection which the court held the Respondent entitled to claim.

This same contention by the Petitioner was rejected by the Court of Appeals, with an objective and sound analysis, as follows:

> "Finally, by reference to matters not in evidence, plaintiff in effect asks us to take judicial notice of a

reckless disregard for the truth on the part of the John Birch Society and its affiliates.[15] Unquestionably, a judge's sympathetic reaction to the point of view expressed in an article which has been found to contain libelous matter may make it easier for him to afford a publisher First Amendment Protection. We

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[15]"Plaintiff makes three arguments that were not pressed below. (1) He contends that recklessness is established by the fact that representatives of the John Birch Society have previously referred to great Americans, such as President Eisenhower, as 'Communists,' and that certain of its procedures contemplate the deliberate use of propaganda that may well be inaccurate. This contention is unsupported by any evidence in the record. Plaintiff does argue that he was prevented from introducing all of his evidence on actual malice because the trial court had previously ruled—contrary to its reassessment of the situation at the time of the motion for judgment n.o.v.—that the *New York Times* standard did not apply. However, plaintiff did present evidence of malice (both the 'constitutional' and the 'ill will' type) to support his damage claim and no such evidence was excluded; at least he points to no occasion when he made an offer of proof of relevant evidence which was refused. Even if the references to President Eisenhower had been offered, such evidence would not meet the *New York Times* standard. Plaintiff does not contend that Stanley knew him or anything about him when the article from Stang was received. At most the 'Eisenhower' evidence tends to prove that Stanley would be less disposed than another editor to question the author's characterization of plaintiff. (2) He contends that continued distribution of the April edition of *American Opinion* after this litigation was commenced establishes defendant's recklessness; however, defendant offered evidence for the purposes of proving a good faith post-complaint attempt to verify the charges, and plaintiff persuaded the court to exclude such evidence on the ground that '. . . anything that was done after the publication of the article (is) entirely irrelevant to these proceedings.' S.A. 104. (3) Plaintiff seems to contend, on appeal, though he never so argued at trial, that since Stang was described as a 'contributing editor' in later issues of the magazine, though not in the April 1969 issue, that defendant should be held liable on a *respondent superior* doctrine for the malice of Stang. We do not find the later 'contributing editor' characterization in itself, sufficient to change the free-lance character of Stang's relationship with defendant. No other evidence of an employer-employee relationship was proffered. Thus, we also find no error in the trial court's refusal to order defendant to produce Stang for examination as an adverse witness."

> *cannot,* however, *apply a fundamental protection in one fashion to the New York Times and Time Magazine and in another way to the John Birch Society.* Whether we are moved to applaud or to despise what is said, our duty to defend the right to speak remains the same.
>
> "The judgment is affirmed."

It is abundantly clear that the Petitioner's claimed denial of a fair trial and due process is unsupported by the record below.

Further, the Petitioner alleges that he was denied due process because he was ordered by the Court of Appeals to pay the costs which amounted to $2,021.30. The Petitioner also states that the decision of the Court of Appeals was close, however, it should be noted that the decision of the Court of Appeals was 3-0 for the Appellee-Respondent herein.

Rule 39(a), Federal Rules of Appellate Procedure, provides:

> "COSTS
>
> "(a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; *if a judgment is affirmed costs shall be taxed against the appellant unless otherwise ordered;* * * *."

The United States Court of Appeals for the Seventh Circuit properly applied the Rule 39(a) as it affirmed the decision of the trial court.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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January, 1973